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Supreme Court of the United States

OCTOBER TERM, 196[illegible]

THE CREEK NATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

THE CREEK NATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, The Creek Nation of Indians, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled cause on March 1, 1961.

Opinion Below

The opinion of the United States Court of Claims is not as yet reported (Appendix, p. 28).

JURISDICTION

The opinion of the Court below (Appendix, p. 28) was entered on March 1, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. 1255, and Sections 20(b) and 20(c) of the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054, 25 U. S. C. Section 70s).

QUESTIONS PRESENTED

1. Whether the United States has an obligation to render a clear and accurate accounting of its dealings and the fulfillment of its treaty obligations owing to an Indian tribe in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race; or whether the United States is merely in a position of a debtor in its relationship under a treaty with an Indian tribe.

In other words, whether a fiduciary relationship exists between the United States and an Indian tribe (in this case the Creek Nation of Indians) requiring the United States to account strictly to the Indian tribe for the amounts disbursed by the United States in fulfillment of its treaty obligations; or whether the relationship is merely that of debtor-creditor.

2. Whether an Indian tribe can rely upon admissions contained in an accounting made by the accounting officers of the United States showing that the United States had failed to fulfill its treaty obligations to said tribe, and that balances are due and owing to the tribe under said treaty obligations of the United States.

3. Whether the United States has the burden of proving the credits it claims against amounts shown by its accounting to be due and owing an Indian tribe under treaty stipulations between the United States and an Indian tribe.

4. Whether the Court of Claims has discharged its duty as an appellate court under Section 20(b) of the Indian Claims Commission Act, when it, by a mere per curiam statement, affirms the findings and opinion of the Indian Claims Commission in a case wherein appellant raises serious objections with respect to the failure of the Commission to find facts essential to the proper disposition of the claims presented, or found facts which were not

supported by substantial evidence, or which were contrary to the record, when the above Act directs that the Court "shall" review the whole record and settle such questions.

5. Whether a denial of a writ of certiorari by this Court constitutes an approval of the decision of the lower court.

TREATIES AND STATUTES INVOLVED

The Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. 70-70v, provides in pertinent part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> "All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.
>
> "In determining the quantum of relief the Commission shall make appropriate deductions for all pay-

ments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * * *."

* * * *

"Sec. 20(b). When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

"(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended."

The treaties and other statutes involved in the claims of petitioner are printed in the Appendix pp. 23-27.

STATEMENT

The petitioner, the Creek Nation of Indians, brought an action before the Indian Claims Commission under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. §§ 70-70v, to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.

The petitioner (plaintiff-appellant below) alleged that the full amounts which the United States was obligated to pay to the Creek Nation as considerations due for cessions of Creek lands under these treaties were not in fact paid, and petitioner claimed the right to recover the unpaid balances.

The United States answered denying that any sums were due, owing and unpaid under the treaties in question. It also presented defenses of res judicata and release, which the Indian Claims Commission did not consider because it decided that the petitioner had not proved its case (Appendix p. 31).

The Creek Nation relied upon and introduced in evidence before the Indian Claims Commission a report of the Government's own General Accounting Office setting forth in detail all treaty payments made by the United States to the Creek Nation under the treaties in question, shown by the records which were maintained solely by the Government, and are now in the custody of the General Accounting Office. In other words, the Creek Nation

relied solely upon the accounting of disbursements under these treaties made by the Government's own accounting officers. These records do not specifically show that the entire amounts due under the treaties in issue were paid to the Creek Nation (Appendix p. 31).

Claims Under Treaties of 1802 and 1805

The parties agreed that the total obligation of the United States to the Creek Nation under Article II of the Treaty of June 16, 1802, 7 Stat. 68 (Appendix pp. 24, 32) was $317,000. The General Accounting Office report shows that the total amount specifically allocated to payments of the Government's obligation under this treaty was $254,690.25. The petitioner claimed that the unpaid balance of $62,309.75 was due and owing to it as disclosed by the Government's own accounting.

The parties agreed that the total obligation of the United States to the Creek Nation under Article III of the Treaty of November 14, 1805, 7 Stat. 96 was $206,000 (Appendix pp. 25, 32). The General Accounting Office report shows that the total amount specifically allocated to payments of the Government's obligations under this treaty was $169,452.25. The petitioner claimed that the unpaid balance of $36,547.75 was due and owing to it as disclosed by the Government's own accounting (Appendix p. 32).

The total amount claimed by petitioner under the Treaties of 1802 and 1805 was $98,857.50. The Indian Claims Commission failed to make proper findings to show that this amount was due petitioner (Appendix p. 32).

To meet the issue thus arising under these two treaties the United States introduced in evidence certain expenditures during the years 1803 through 1809, totaling $77,263.45 in goods and money forwarded to Creek Indians, under an earlier Treaty of August 7, 1790, 7 Stat. 35,

between the United States and the Creek Nation, *which was not in issue*, and which expenditures its own accounting office specifically allocated to expenditures under this 1790 treaty, and not to the Treaties of 1802 and 1805 in issue. With respect to these disbursements under the Treaty of 1790, the General Accounting Office report states that: "It appears, however, that portions of said amounts were in fulfillment of treaties with said Indians subsequent to the aforesaid Treaty of 1790, as the value of the goods furnished said Indians during the years indicated was in excess of the $1,500 annuity due said Indians under said treaty." * The General Accounting Office, however, further stated that it could not specifically identify such amounts with the later treaties. (Appendix pp. 32-33).

Also the United States, in search for further credits under the Treaties of 1802 and 1805, injected into the case certain disbursements, totaling $22,198, made during the years 1811, 1815, 1817, and 1818, which the General Accounting Office report stated it could not identify with any specific treaty. The United States, nevertheless claimed these disbursements as credits against the balances shown in the General Accounting Office report to be due the Creek Nation under the Treaties of 1802 and 1805, without identifying them with these treaties (Appendix p. 33).

The United States contended that because the petitioner did not show that any of the total amounts of the credits claimed by the Government, or $99,461.45, were *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government was entitled to credit the entire amount against its obligations under those treaties. The

* Petitioner pointed out that the annual obligations of the United States under the Treaty of 1790 were at least $3,700.00, instead of the $1,500.00 shown by the General Accounting Office Report, because of an obligation to pay certain Creek Chiefs annual stipends during their lifetimes under a secret article of said treaty.

$99,461.45 exceeded the $98,857.50 claimed by petitioner to be due, so as to defeat petitioner's recovery under these two treaties (Appendix pp. 32-33).

The Indian Claims Commission adopted the Government's position and determined that nothing was due to petitioner (7 Ind. Cl. Comm. 117, Appendix, p. 37). In doing so the Commission relied largely on a decision of the Court of Claims supporting the Government's position in Chickasaw Nation v. United States (1945), 103 C. Cls. 1, certiorari granted but limited to the question of specific designation of offsets, and judgment reversed, 326 U. S. 217. The Indian Claims Commission, in relying upon this case rather than upon more recent decisions of the Court of Claims which overrule it, stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in Chickasaw] is evidence that it approved the holdings of the Court of Claims in reference to such matters." (7 Ind. Cl. Comm. at 135, Appendix pp. 37-38, 71). The Commission went on to say that the decision of that court in Sioux Tribe of Indians v. United States (1946), 105 C. Cls. 725, "could not overrule the [Chickasaw case] because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari." (7 Ind. Cl. Comm. at 137, Appendix pp. 37, 40-42, 71). This court has made it clear that no such inference is to be drawn from its denial of certiorari in any case (Dissenting opinion of Judge Littleton, Appendix, pp. 37-38).

The main issue in this case is thus presented.

Petitioner argued that the relationship between the United States and an Indian tribe is such that the Government had the burden of presenting an accurate accounting of its payments to petitioner pursuant to the treaties in question. Petitioner maintained therefore, that the Government was not entitled to credit for any amounts not

specifically allocated on its books to fulfillment of these treaties; and that the Government had the clear burden of proving the credits it claimed (Appendix p. 33).

Petitioner submits that the many decisions of this Court establish that the fiduciary relationship between the United States and the Indian tribes is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of accounting clearly for the fulfillment of its Indian treaty obligations (Appendix p. 33).

Claim Under Treaty of 1832

As a part of the consideration due the Creek Nation under Article XIII of the Treaty of March 24, 1832, 7 Stat. 366 (Appendix pp. 25, 45), the United States agreed to expend $3,000 per year for 20 years for the education of Creek children. The parties agreed that the total obligation under the Treaty of 1832 was $60,000.00. The Government's accounting report shows that $49,938.99 only was disbursed to fulfill its obligation, and shows a balance due the Creek Nation under this treaty obligation of $10,061.01, which petitioner claimed (Appendix p. 45).

The Indian Claims Commission failed to make any finding as to whether or not the Government's obligation under this 1832 Treaty was fulfilled, but merely restated the Government's contention (Appendix pp. 46, 60). Petitioner claims that the failure of the Commission to make such a material finding was error (Seminole Nation v. United States, 316 U.S. 286, 300; Seminole Nation v. United States, 316 U.S. 315, 316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255).

Claim under Treaty of 1833

As a part of the consideration for the Treaty of February 14, 1833, 7 Stat. 417, the United States in Article V thereof, agreed "to furnish to the Creek Indians west of

the Mississippi, one blacksmith, and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed--also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * * *." (Appendix pp. 25-26, 46).

The General Accounting Office report showed that Congress fixed the amount for blacksmiths, etc. under this obligation at $1,700.00 per annum over a long period of time, 1834-1878 (Act of June 17, 1844, c. 108, 5 Stat. 704, 706; Appendix p. 26); and, therefore, the total obligation for blacksmiths and for education under this treaty was definitely fixed at $2,700. per annum, and for 39 years the total obligation of the United States thereunder was $105,690. The General Accounting Office report further shows that only $76,285.45 was paid thereunder, leaving a balance of $29,404.55 due and owing to the Creek Nation under this treaty obligation of the United States, which petitioner claimed (Appendix 47, 61).

The Indian Claims Commission held that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by petitioner was correct, in view of its holding that petitioner had "not proven the alleged failures of the United States to fulfill its obligations * *." 7 Ind. Cl. Comm. 138, Appendix pp. 61-62).

Petitioner on appeal to the Court of Claims contended that the Commission erred in failing to find the essential facts necessary to a proper disposition of this claim—that it should have found from the evidence before it what

the total obligation of the United States was under said treaty provisions, and whether or not it had been fulfilled by the United States. (Appendix p. 47).

Claim under Treaty of 1856

Under Article VI of the Treaty of August 7, 1856, 11 Stat. 699 (Appendix p. 27), as a part of the consideration for said treaty, the United States undertook to invest $200,000 in safe stocks and to apply the interest of at least 5% per annum to the education of the Creeks. The General Accounting Office report showed that the interest for the years 1857 through 1861, inclusive, a total of $50,000.00 was appropriated by Congress to fulfill this treaty obligation of the United States, but that only $21,000.00 was disbursed for the fulfillment of this treaty obligation during these years, and that $29,000.00 was due on this treaty obligation of the United States (Appendix pp. 47, 48, 62).

The United States claimed that the $29,000 was paid either by the Confederate States pursuant to a treaty made with the Creek Nation on July 10, 1861, or that this amount was disbursed by the United States for the relief of refugee Indians during the Civil War under authority of the Civil War Resolution of February 22, 1862, 12 Stat. 614, and that by Article VI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790, this diversion of Creek annuities was ratified and confirmed.

The petitioner contended that during the Civil War the Creek Nation was about evenly divided in its sympathies, and one-half or more of its members migrated to Kansas where they remained during the Civil War Period; that payment, if any was made, to that portion of the nation that went with the South would not be payment to the Creek Nation; and that there was no evidence in the record to show that the $29,000 claimed was actually disbursed for the relief of the members of the Creek Nation in Kansas.

The Indian Claims Commission found that a payment of this $29,000 was made to the southern portion of the Creek Nation; and further, that Congress authorized payment of Creek annuities to refugees in Kansas which might and could have included the $29,000 in question, and that the Creek Nation ratified such diversions under the Treaty of 1866, and denied recovery on this claim (Appendix pp. 47-53, 62-63).

Petitioner on appeal to the Court of Claims challenged the findings of the Commission on the ground that such findings were not supported by substantial evidence, and that no payment of the $29,000 due was ever shown by the evidence to have been made to the Creek Nation, to whom the treaty obligation of the United States was due and owing.

From the findings and holding of the Indian Claims Commission dismissing the several claims set forth in the petition (7 Ind. Cls. Comm. 117, 139; Appendix pp. 28-30, 74), the Creek Nation appealed to the Court of Claims under Section 20 (b) of the Indian Claims Commission Act. After full argument, the majority of the Court of Claims (3 Judges concurring), on March 1, 1961, merely by a per curiam statement, affirmed the findings and holdings of the Indian Claims Commission, thus perpetuating the errors made by the Indian Claims Commission, and completely failing to review the issues raised on appeal.

Judge Littleton, the Senior Judge of the Court who was joined by Judge Madden, wrote a dissenting opinion, the only opinion of the Court of Claims in this case, analyzing the findings and holdings of the Indian Claims Commission, and pointing out the errors made by the Commission, and upholding the claims of the Indians, in the instances set forth in this opinion (Appendix pp. 28-54).

The dissenting opinion pointed out as follows (Appendix, pp. 28-30):

"This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. * * * The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment (Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligation which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not

disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Court of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. * * In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail."

The dissent then analyzes the issues raised by the appeal in this case, and we believe correctly states the law governing this case; and for this reason we earnestly request this Court to grant the writ of certiorari herein, and adopt the views of the minority opinion, which is the only opinion written by the Court of Claims in this case.

REASONS FOR GRANTING THE WRIT

Petitioner submits that this Court should grant the writ of certiorari herein requested for the following reasons:

1. This case involves serious and important questions of federal Indian law, and presents entirely novel questions which have been raised for the first time under the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049), and go to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission, the settlement of which will serve as a general guide to their disposition. The mere per curiam statement of the majority of the Court of Claims failed to decide these questions, and we believe that the dissenting opinion of Judge Littleton, Senior Judge of that Court (now re-

tired), who was joined by Judge Madden, properly sets forth the law governing this case (Appendix pp. 28-53).

We submit that the per curiam statement of the Court of Claims, merely affirming the decision of the Indian Claims Commission without more, in a case wherein serious questions of fact and law are raised by the petitioner before that court, falls far short of meeting the obligation of the Court of Claims as an appellate court to give guidance to the court below (the Indian Claims Commission), and to the litigants in an appeal on novel and important matters, an obligation, which, until this time, the court has conscientiously fulfilled. (Dissenting opinion, Appendix pp. 28-30).

2. There is a wide divergence of opinion on the novel and important issues in this case between the decision of the Indian Claims Commission, as affirmed by a per curiam statement of the Court of Claims, and the able dissenting opinion of Judge Littleton concurred in by Judge Madden of the Court of Claims, which can only be resolved by this Court. Judges Littleton and Madden have written most of the decisions of the Court of Claims involving questions arising from the administration of the Indian Claims Commission Act, and in doing so have become extremely conversant with the applicable law, and we submit that their dissenting opinion correctly states the law applicable to this case.

Furthermore, the majority per curiam statement of the Court of Claims mistakes that court's function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeal in appeals from the District Courts, 28 U. S. C. § 1291; whereas Section 20(b) of the Indian Claims Commission Act is very explicit in defining the function of the Court of Claims in reviewing final determinations of the Commission, and requires that the Court "shall determine whether the findings of fact of the Commission are supported by substantial evidence, * *

and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, * *." (Appendix p. 30)

In the instant case serious objections were earnestly and fully raised and argued by the petitioner in that Court regarding the findings of the Commission and lack of essential findings by the Commission, and the mere per curiam statement of the majority of the Court of Claims does not review the failures of the Commission to make essential and proper findings of fact, and does not meet the obligation of that Court as an appellate court under the provisions of Section 20(b) of said Indian Claims Commission Act, and deprives the litigants of rights which Congress intended them to have in the final settlement of their claims under this Act.

3. The holding of the Indian Claims Commission, affirmed by the per curiam statement of the majority of the Court of Claims, is wholly contrary to the long line of decisions of this Court, in the following three respects:

a. In the language of the dissenting opinion of Judge Littleton (Appendix pp. 29, 33):

> "In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in a manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the

decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions.

* * * *

"I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties."

And in reviewing the decisions of this court holding that a general fiduciary relationship exists between the United States and the Indian tribes, the dissenting opinion of Judge Littleton further states (Appendix p. 34):

"The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to 'be judged by the most exacting fiduciary standards.' Seminole Nation v. United States, 316 U.S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in Cherokee Nation v. Georgia, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> "[The Indians] are in a state of pupilage. Their relation to the United States *resembles that of a ward to his guardian.*

"With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in Creek Nation v. United States, 295 U.S. 103, 109-110:

> "* * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> "* * * It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

> "The Indian Claims Commission itself has recognized that a 'fiduciary relationship' exists between the Creek Nation and the United States. The Creek Nation v. United States, 2 Ind. Cl. Comm. 66, 114."

The dissenting opinion further reviews the decisions of this Court, holding that a fiduciary relationship exists between the United States and the Indian tribes. In United States v. Kagama, 118 U. S. 375 this Court said, "These Indian tribes *are* the wards of the Nation." 118 U. S. at 383. In Choctaw Nation v. United States, 119 U. S. 1, this Court reiterated what it said in the Kagama Case, and further defined the relationship of the United States to the Indian tribes, as follows:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." 119 U. S. at 27-28.

This Court repeated, in United States v. Payne, 264 U.S. 446, that with regard to the Indians,

> "• • • the United States occupies the position and assumes the responsibilities of virtual guardianship. • • •." 264 U. S. at 448.

Of particular importance is this Court's holding in Seminole Nation v. United States, 316 U. S. 286, which

involved the question of the handling of annuity payments to Indians. The Court stated:

> "• • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 316 U.S. at 296-297."

In his dissenting opinion Judge Littleton further pointed out (Appendix pp. 38-39):

> "• • The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, said that the amounts there in question, a 'Treaty Fund' of annual appropriations for payment of treaty stipulations, i.e., for payment of a *debt* to the Indians, had 'exactly the same characteristics' as a 'Trust Fund' applied to the education of the Indians. The Court said, 'They are moneys belonging really to the Indians.' 210 U.S. at 81. That case clearly shows that the treatment of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, 'In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.'"

The Court of Claims has, up to the decision in this case, followed this Court's decisions holding that a fiduciary relationship exists between the United States and the Indian tribes. In Menominee Tribe v. United States (1944), 101 C. Cls. 10, 19, 20, the court held that it is "settled doctrine that the United States, as regards its

dealings with the property of the Indians, is a trustee," and described the relationship of the United States to the Indian tribes as that of "a debtor who stands in the position of a trustee or fiduciary toward his creditor", and further held that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee." In Chickasaw Nation v. United States (1955), 132 C. Cls. 359, 362, the Court characterized the Indians as "quasi wards" of the United States. In United States v. The Seminole Nation, Appeal No. 3-58, decided June 3, 1959, —— C.Cls. ——, 173 F. Supp. 784, 790, the Court said: "Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian 'wards'". Here the Court clearly stated that the nature of the relationship between the United States and Indian tribes in general is that of "a fiduciary relationship". And in Sioux Tribe v. United States (1946), 105 C. Cls. 725, 802, the Court clearly stated:

> "* * * The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting."

After reviewing the above decisions the dissenting opinion of Judge Littleton stated (Appendix p. 42):

> "The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial

> records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account of the payments it makes pursuant to its obligations to the Indians."

We believe that this dissenting opinion correctly reflects the decisions of this Court, and that the per curiam statement of the Court of Claims is wholly contrary to the decisions of this Court which clearly hold that a fiduciary relationship does exist between the United States and the petitioner, the Creek Nation of Indians.

b. The majority per curiam statement of the Court of Claims is contrary to the holdings of this Court and its own holdings—that the failure of the Commission to make essential findings of fact, or makes findings not supported by substantial evidence—is reversible error. Seminole Nation v. United States, 316 U. S. 286, 300; Seminole Nation v. United States, 316 U. S. 315-316; Snake or Piute Indians v. United States (1953), 125 C. Cls. 241, 255.

c. The majority per curiam statement of the Court of Claims, in holding that a denial of a writ of certiorari is tantamount to the approval of this court of such decision, is wholly contrary to the decisions of this court, as pointed out in the dissenting opinion.

This court has held that no such inference is to be drawn from its denial of certiorari in any case. United States v. Shubert, 348 U. S. 222, 228-229; Sunal v. Large, 332 U. S. 174, 181; House v. Mayo, 324 U. S. 42, 48; Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403-404; United States v. Carver, 260 U. S. 482, 490; Hamilton-Brown Shoe Co. v. Wolf Bros. and Co., 240 U. S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in Darr v. Burford, 339 U. S. 200, 226-228, wherein he stated at page 226:

> "The significance of a denial of a petition for certiorari ought no longer to require discussion. This

> Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.
>
> • • • •
>
> "Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."

We submit that the dissenting opinion of Judge Littleton, joined in by Judge Madden, the only opinion of the Court of Claims in this case, correctly sets forth and applies to the claims presented in this case the applicable principles of law laid down by this Court.

CONCLUSION

We submit that it is the function of an appellate court to settle the law, and not to create confusion by failing to abide by the long line of decisions of this Court applicable to this case; and the mere per curiam statement of the majority of the Court of Claims which has failed to settle the issues in this case, has created the problems which have necessitated petitioner's request that this Court grant certiorari to review the novel and important questions presented in this case, and adopt the views of the dissenting opinion of Judges Littleton and Madden, which are clearly in accord with the long line of decisions of this Court.

Respectfully submitted,

THE CREEK NATION OF INDIANS,
Petitioner,

PAUL M. NIEBELL,
Attorney for Petitioner.

APPENDIX

Statutes and Treaties Involved

The treaties between the United States and the Creek Nation herein involved, provide in part as follows:

Treaty of August 7, 1790, 7 Stat. 35, 2 Kapp. 25.

"Article II. The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * *

"Article IV. * * it is hereby agreed, in addition to the considerations heretofore made for the said land, that the United States will cause certain valuable Indian goods now in the state of Georgia, to be delivered to the said Creek nation; and the said United States will also cause the sum of one thousand five hundred dollars to be paid annually to the said Creek nation. * *

"Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned them by the Creeks for cultivation for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

Article XIV. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President

of the United States, with the advice and consent of the Senate of the United States."

Treaty of June 16, 1802, 7 Stat. 68, 2 Kapp. 58.

"Article II. The Commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars for the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty-five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged; ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States; the said debts, after the payment aforesaid, to become the right and property of the Creek nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct; five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. And it is further agreed that the United States shall furnish to the said nation two sets of blacksmiths tools, and men to work them, for the term of three years.

"Article IV. The contracting parties to these presents, do agree that this treaty shall became obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof."

Treaty of November 14, 1805, 7 Stat. 96, 2 Kapp. 85.

"Art. III. It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article, as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocmulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonably signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest: The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

"Art. V. The President of the United States may cause the line to be run from the high shoals of Apalacha, to the mouth of Uleofauhatche, at such time, and in such manner, as he may deem proper, and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Treaty of March 24, 1832, 7 Stat. 366, 2 Kapp. 341.

"Art. XIII. * * * Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. * * *"

"Art. XV. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States."

Treaty of February 14, 1833, 7 Stat. 417, 2 Kapp. 388.

"Art. V. As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with

the present amicable and satisfactory adjustment of their difficulties with the Cherokees; experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * *."

"Art. IX. This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

The Act of June 17, 1844, c. 108, 5 Stat. 704, 706, defined the annual obligation of the United States under this treaty as follows:

"For blacksmith and assistant, and use of shop and tools, during the pleasure of the President, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, eight hundred and forty dollars;

"For iron and steel, two hundred and seventy dollars;

"For wagonmaker, stipulated in the fifth article of the treaty of fourteenth February eighteen hundred and thirty-three, six hundred dollars;

* * * *

"For education, stipulated in the fifth article of the treaty of fourteenth February, eighteen hundred and thirty-three, one thousand dollars; * * *."

The Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756.

"Art. VI. In consideration of the foregoing quit-claim, relinquishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent. per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * *

"Art. XXVI. This convention * * * shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States."

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 3-59

(Decided March 1, 1961)

THE CREEK NATION v. THE UNITED STATES

Paul M. Niebell for appellant.

Keith Browne, with whom was *Assistant Attorney General Perry W. Morton*, for appellee.

OPINION

PER CURIAM: This suit was filed with the Indian Claims Commission (Docket No. 292) to recover sums alleged to be due the Indians under certain treaties entered into between the Creek Nation and the United States. The Commission entered findings of fact and an opinion pursuant to which a judgment of dismissal was entered. The Creek Nation appeals here from that decision.

Upon consideration of the record below, as well as the briefs and argument of counsel in this court, and the court being in agreement with the disposition of the case made by the Indian Claims Commission, its judgment of dismissal is affirmed.

It is so ordered.

LITTLETON, *Judge* (*Ret.*), with whom MADDEN, *Judge*, concurs, dissenting:

This appeal, which the majority has disposed of summarily in a per curiam statement which merely affirms the determination of the Commission, concerns an entirely novel question which has been raised for the first

time under the Indian Claims Commission Act and goes to the proper administration of that Act in the general area of accounting suits, a number of which are now pending before the Commission. While the instant suit was not brought strictly as a suit for an accounting, it is very similar in nature to the accounting suits now pending before the Commission, and it will inevitably serve as a general guide to their disposition. In general, the grounds for this dissent from the position taken by the Commission and affirmed by the majority of this court, without analyzing the issues, are that the ruling of the Commission that the Government has no obligation to render a clear and accurate accounting of its dealings and the fulfillment of treaty obligations in the manner of a fiduciary or of a superior and learned power dealing with an unlettered and inferior tribe or race, but is merely in a position of a debtor in its relationship under a treaty with the Indians, is contrary to the decisions of the Supreme Court, of this court, and of at least one of the Commission's own opinions. In the *Iowa Tribe of the Iowa Reservations in Kansas and Nebraska, et cetera* case, Docket No. 70, decided June 19, 1952, 2 Ind. Cl. Comm. 167, 176, the Commission stated that:

> In its dealings with the Tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations.

The Commission has erroneously placed great reliance on the mistaken view that denial of certiorari by the Supreme Court constitutes approval of the decision of the case wherein certiorari is denied. Moreover, I am of the opinion the Commission has not followed the principles of the decided cases nor the rules of this court with respect to burden of proof where the Government sets up and relies on the affirmative defense of payment

(Rule 15(b) of the Rules of the Court of Claims). Finally, the per curiam opinion of this court falls far short of meeting the obligation of an appellate court to give guidance to the court below (the Indian Claims Commission) and to the litigants in an appeal on a novel and important matter, an obligaion which, until this time, the court has conscientiously fulfilled. The appeal by the Indians in this case is in no sense frivolous and I am of the opinion that the litigants are entitled to an opinion showing that the court has not disregarded or overlooked the very serious arguments of counsel on both sides. Furthermore I believe that the majority mistakes this court's appellate function in claims appealed from the Indian Claims Commission to be like that of the Circuit Courts of Appeals in appeals from the District Courts. 28 U.S.C. § 1291. Section 20(b) of the Indian Claims Commission Act is quite explicit with regard to the manner in which this court is to review final determinations of the Commission. It provides:

> On said appeal the Court *shall* determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. • • • [Emphasis supplied.] 25 U.S.C. § 70s(b).

In the instant case there are serious objections earnestly and fully argued by the appellant regarding the findings of the Commission and lack of findings by the Commission. For these reasons I am forced to state my views in some detail.

This is an appeal from a decision of the Indian Claims Commission. Appellant, the Creek Nation, brought an action under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. §§ 70-70v, to recover for certain unfulfilled obligations of the United States under five treaties between the Creek Nation and the United States.[1] Appellant alleged that the full amounts which the United States was obligated to pay to appellant under these treaties were not in fact paid, and appellant claimed the right to recover the unpaid balances. The United States denied that any sums were due, owing or unpaid under the treaties in question. It also presented defenses of res judicata and release.[2]

This case involves the question of whether appellant made a sufficient showing that the Government did not fulfill its treaty obligations.

Appellant introduced in evidence before the Indian Claims Commission the records of treaty payments to appellant which were maintained by the Government and are now in the custody of the General Accounting Office. These records do not specifically show that the entire amounts due under the various treaties in issue were paid to appellant.

The amounts claimed by appellant are $62,309.75 under the Treaty of 1802, $36,547.75 under the Treaty of 1805, $10,061.01 under the Treaty of 1832, $29,404.55 under the Treaty of 1833, and $29,000 under the Treaty of 1856. The total claimed is $167,323.06.

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[1] The treaties involved are those of June 16, 1802, 7 Stat. 68; November 14, 1805, 7 Stat. 96; March 24, 1832, 7 Stat. 366; February 14, 1833, 7 Stat. 417; and August 7, 1856, 11 Stat. 699.

[2] Because of its resolution of this case on the ground that appellant had not proved its case, the Indian Claims Commission did not deal with the issues of res judicata and the effect of the release given by appellant in 1856. These issues will not, therefore, be dealt with in this dissenting opinion.

I think that appellant established its claim to $26,396.05 of that amount. Another $29,000 appears to be due appellant, but the Government should have the opportunity upon remand to the Commission to show that the amount was paid. As to an additional $39,465.56, the Commission did not make certain essential findings of fact, and that portion of the case should have been remanded for such findings.

The basic issue in this case can be understood by a preliminary look at the problems arising in connection with the Treaties of 1802 and 1805.

With respect to the 1802 Treaty, 7 Stat. 68, the parties agree that the total obligation under Article II was $317,000. The General Accounting Office report shows the amount specifically allocated to payment of obligations under the 1802 Treaty to be $254,690.25. The parties also agree that the total obligation under Article III of the 1805 Treaty, 7 Stat. 96, was $206,000. The G.A.O. report shows $169,452.25 as disbursements made in connection with the 1805 Treaty. Appellant claims, therefore, that there is an unpaid balance of $62,309.75 due under the 1802 Treaty, and of $36,547.75 under the 1805 Treaty, making a total under the two treaties of $98,857.50, and it complains of the Commission's failure to so find.

The G.A.O. report also shows that, during the years 1803 through 1809, a total of $77,263.45, in money and goods, was paid and forwarded to the Creek Indians.[3]

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[3] Appellant's contention that the fact that the section of the G.A.O. report which lists these disbursements is labeled "* * * information relative to disbursements made by the United States for the benefit of the Creek Nation of Indians *pursuant to the Treaty of August 7, 1790, 7 Stat. 35*" (emphasis supplied) shows that the disbursements had no relation to the 1802 or 1805 Treaties is negatived by the statements in the body of the section that the payments could not be definitely attributed to any particular treaty, and also by the separate listing within the section of other disbursements which could be allocated definitely to the 1790 Treaty.

For the years 1811, 1815, 1817 and 1818, payments totaling $22,198 are shown to have been made to the Creeks. No part of this total amount of $99,461.45 was allocated by the G.A.O. report to any particular treaty.

Appellee's contention is that, because appellant did not show that any of this $99,461.45 was *not* paid in satisfaction of the obligations of the 1802 and 1805 Treaties, the Government is entitled to credit the entire amount against its obligations under those treaties. The $99,461.45 exceeds the $98,857.50 claimed by appellant to be due, so appellee's theory would defeat recovery under these two treaties. The Indian Claims Commission adopted the Government's position and determined that nothing was due to appellant. 7 Ind. Cl. Comm. 117.

Appellant argues that the relationship between the United States and an Indian tribe is such that the Government has the burden of presenting an accurate accounting of its payments to appellant pursuant to the treaties in question. Appellant maintains, therefore, that the Government is not entitled to credit for any amounts not specifically allocated on its books to fulfillment of these treaties.

I think that the decisions of the Supreme Court of the United States, and the prior decisions of this court, establish that the relationship between the United States and an Indian tribe is sufficiently similar to the relationship between a guardian and its ward to impose upon the United States the burden of clearly accounting for its fulfillment of its Indian treaties.

I also think, however, that appellant here has attempted to draw a more ambitious conclusion than is warranted from the fact of its relationship with the Government. While the Government had the duty to clearly account for its performance of its treaty obligations, I think that it has done so when it has shown payments to the Creek Nation which, although not specifically labeled as pay-

ments pursuant to the treaties in question, are sufficiently identified in the Government's records to show that they could have been nothing other than payments pursuant to those treaties. For example, if payments labeled "annuities for the Creeks under Creek treaties" are listed in the Government's records for years in which no treaty other than the treaty in question was in force, the conclusion is warranted that the payments were made under the treaty in question.

THE RELATIONSHIP BETWEEN THE PARTIES

The Supreme Court has on numerous occasions made clear that the duties owed by the Government of the United States to the Indian tribes with which it deals are of the most exacting nature, to "be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297. The basis for the high obligations owed by the Government was established as early as 1831, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17, where the Court, speaking through Chief Justice Marshall, stated:

> [The Indians] are in a state of pupilage. Their relation of the United States *resembles that of a ward to his guardian.*

With respect to the relationship between the Creek Nation and the United States, the Supreme Court has said, in *Creek Nation* v. *United States*, 295 U.S. 103, 109-110:

> • • • The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government.
>
> • • • It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests.

The Indian Claims Commission itself has recognized that a "fiduciary relationship" exists between the Creek

Nation and the United States. *The Creek Nation* v. *United States*, 2 Ind. Cl. Comm. 66, 114.

The Supreme Court further defined and established the nature of the relationship between the Government and the Indian tribes as similar to that of guardian and ward in *United States*, v. *Kagama*, 118 U.S. 375, where the Court said, "These Indian tribes *are* the wards of the Nation." 118 U.S. at 383.

Appellee places great reliance upon an 1886 decision of this court, *Choctaw Nation* v. *United States*, 21 Ct. Cl. 59, where it was said that the cases "fall far short of holding that the rules of law as applicable to controversies between guardian and ward are to prevail in suits between the United States and the Indian tribes." 21 Ct. Cl. at 92-93. Appellee has overlooked the fact that the decision was reversed by the Supreme Court, in *Choctaw Nation* v. *United States*, 119 U.S. 1, and that the Supreme Court said:

> As was said by this court recently in the case of the *United States* v. *Kagama*, 118 U.S. 375, 383: "These Indian Tribes *are* the wards of the Nation; they are communities *dependent* on the United States; • • •"
>
> • • • •
>
> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulat-

> ing the rights and obligations of private persons, equally subject to the same laws. 119 U.S. at 27-28.

The Court repeated, in *United States* v. *Payne*, 264 U.S. 446, that, with regard to the Indians,

> • • • the United States occupies the position and assumes the responsibilities of virtual guardianship. • • •. 264 U.S. at 448.

Of particular importance is the Supreme Court's ruling in *Seminole Nation* v. *United States*, 316 U.S. 286, which involved the question of the handling of annuity payments to Indians. It is true that the treaty had set up a "trust fund" out of the interest from which the annuities were to be paid. But the Supreme Court did not base its conclusion upon the "trust nature" of the particular fund involved. The Court stated:

> • • • this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [Citations omitted.] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. 316 U.S. at 296-297.

The Court made clear that the Government's fiduciary responsibilities derive from the *status* of the "dependent and sometimes exploited" Indians, and that the Government bears these responsibilities "*in its dealings*" with the Indians, not, as defendant would have it, merely in connection with those particular dealings which, when occurring between two equal parties, would give rise to fiduciary duties.

The Indian Claims Commission relied heavily, in its decision of this case, upon *Chickasaw Nation* v. *United States*, 103 Ct. Cl. 1, certiorari granted, limited to question of specific designation of offsets, and judgment reversed, 326 U.S. 217. That case does support appellee's position, but does not have the weight attributed to it by the Indian Claims Commission as a result of the Commission's misconception of the meaning of the Supreme Court's denial of certiorari as to the issues relevant to this case.

In *Chickasaw* the Government's records showed that it had purchased annuity goods for various tribes, but did not show how much of these goods had been allocated to the Chickasaws as distinguished from the other tribes. This court said, "Unless this allocation is known, the shortage, if any, in the goods annuity of $3,000 cannot be ascertained. The accounts show no shortage for which judgment may be given." 103 Ct. Cl. at 35-36. It should be noted, however, that the problem did not receive extended consideration by this court in *Chickasaw*. The Indian Claims Commission, however, in relying upon *Chickasaw* rather than upon more recent decisions of this court which support the conclusion which I would reach, stated that "The refusal of the Supreme Court to allow certiorari on the matters * * * specifically called to its attention [in *Chickasaw*] is evidence that it approved the holdings of the Court of Claims in reference to such matters." 7 Ind. Cl. Comm. at 135. The Commission went on to say that the decision of this court in *Sioux Tribe of Indians* v. *United States*, 105 Ct. Cl. 725, *infra*, "could not overrule the [*Chickasaw* case] because the *Sioux* case is a Court of Claims opinion only, while the holdings in the *Chickasaw* case were approved by the Supreme Court by its refusal to grant a writ of certiorari." 7 Ind. Cl. Comm. at 137.

The Supreme Court has made clear that no such in-

ference is to be drawn from its denial of certiorari in any case.[4]

The Government strenuously urges that the fact that appellant and the Government stand in a creditor-debtor relation precludes the conclusion that it owes appellant the duties of a trustee. The Government's contention is expressly negatived by the language of this court in *Menominee Tribe* v. *United States*, 101 Ct. Cls. 10, 20, where the court stated that the Government is "a debtor who stands in the position of a trustee or fiduciary toward his creditor," when the creditor is an Indian tribe. The Supreme Court, in *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, said that the amounts there in question, a "Treaty Fund" of annual appropriations for payment of treaty stipulations, i.e., for payment of a *debt* to the Indians, had "exactly the same characteristics" as a "Trust Fund" applied to the education of the Indians. The Court said, "They are moneys belonging really to the Indians." 210 U.S. at 81.[5] That case clearly shows that the treatment

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[4] *United States* v. *Shubert*, 348 U.S. 222, 228-229; *Sunal* v. *Large*, 332 U.S. 174, 181; *House* v. *Mayo*, 324 U.S. 42, 48; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U.S. 401, 403-404; *United States* v. *Carver*, 260 U.S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251, 258. See also dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford*, 339 U.S. 200, 226-228, where he stated at page 226:

"The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.

* * * * *

"Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner."

[5] The Government, in its brief in this case, acknowledges that the "treaty stipulations made the basis of claim herein, and the allegations of the petition respecting them fall into" the category which the Supreme Court in *Quick Bear* v. *Leupp* described as "the Indians' money".

of payments of a debt may be governed by fiduciary obligations when the debt is one owed by the United States to an Indian tribe. As the Supreme Court said in *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 297, "In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party."

This court has recognized that it is "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee." *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19. In that case, the Government was merely a debtor, yet the court held that it would "test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee." 101 Ct. Cl. at 19. The duty there imposed on the Government was that of seeing to it that the Indians' property—claims against the Government—was productive of an income. This is certainly more than the duty of an ordinary debtor, and no less rigorous than the duty of keeping a clear account of the Indians' claims. The court characterized the Government's position as that of "debtor-with-the-duties-of-a-trustee", 101 Ct. Cl. at 19 (and has recently characterized the Indians as "*quasi wards*", *Chickasaw Nation* v. *United States*, 132 Ct. Cls. 359, 362).[8]

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[8] This court's language in *Gila River Pima-Maricopa Indians* v. *United States*, 135 Ct. Cl. 180, 189, relied on by the Government, is not to the contrary. All that was said in that case was that the *precise*, *formal* guardian-ward relationship between the United States and an Indian tribe is created by treaty or other specific provision, while in the absence of such express provision the relationship is one which is similar to or resembles the technical guardian-ward relationship, as was held in *Creek Nation* v. *United States*, 318 U.S. 629, 642; *Seminole Nation* v. *United States*, 316 U.S. 286; and *Menominee Tribe of Indians* v. *United States*, 142 Ct. Cl. 555.

This court's opinion in the recent case of *United States* v. *The Seminole Nation*, Appeal No. 3-58, decided June 3, 1959, — Ct. Cl. —, 173 F. Supp. 784, 790, makes clear that all the *Gila River* case

I think that the above discussion indicates that the debt owed to an Indian tribe pursuant to a treaty must be "dealt with by the Government as if it belonged to [the Indians], as morally it does", *Quick Bear* v. *Leupp*, 210 U.S. 50, 80, *supra*, and that the Government is bound by duties of trust in dealing with this money. *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19, *supra*. The decision of this court in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 725,[7] is, therefore, directly applicable here.

> The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802.

In the *Sioux* case, the Indians sought to recover certain amounts disbursed by the Government from trust funds which had arisen from the sale of lands belonging

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said was that while "preciseness" in the relationship is found in the particular treaty provision, the nature of the relationship between the United States and Indian tribes in general is that of "a fiduciary relationship". The court said (173 F. Supp. at 790):

"Whatever the expression or term used, the relationship is one founded upon a distinctive obligation of trust. The obligation owed by the government basically grows out of the dependent status of its Indian 'wards'."

I am also aware of what was said in *Kansas or Kaw Tribe of Indians* v. *United States*, 80 Ct. Cl. 264, 301-302, *cert. denied*, 296 U.S. 577, to the effect that a treaty provision similar to that of Article II of the 1790 Creek Treaty did not create a guardian-ward relationship. That case was decided on December 3, 1934, prior to the Supreme Court's decision in *Creek Nation* v. *United States*, *supra*, announced on April 29, 1935. I think that the *Creek* case vitiates any broad force of this language in the *Kansas* case, which can mean only that a *technical* guardian-ward relationship does not exist. *See United States* v. *Seminole Nation*, *supra*, 173 F. Supp. 784, 790. For the same reason the language in *Omaha Tribe of Nebraska* v. *United States*, 6 Ind. Cl. Comm. 68, 71-74, is of doubtful validity, and is based primarily on the *Kansas* case and a misinterpretation of the *Gila River* case.

[7] Certiorari granted, judgment vacated, and case remanded to Court of Claims for determination as to whether plaintiff-petitioner could assert any additional claims, 329 U.S. 685; supplemental petition dismissed, 112 Ct. Cl. 50; *cert. denied*, 337 U.S. 908.

to the Indians. The disbursements had been made by the Government for certain Indian agency and educational expenses. The Indians claimed that the disbursements were for obligations of the Government, so that they should not have been paid out of the Indians' funds. The Government maintained that the expenditures were proper charges against the Indians' funds since they were expenditures for the benefit of the Indians, and argued that the Indians had the burden of showing what portion of the disbursements were for obligations of the Government. It said that in the voluminous accounting as to the claims presented it could not be expected to detail with exactness the purposes and amounts of the many disbursements, and that the burden rested on the Indians to prove such details. The court held, however, that the "primary duty to so classify and report as to the nature and the amount of disbursements rested on defendant." 105 Ct. Cl. at 802.

The court said:

> Since the Government obligated itself in the treaty and the agreements of 1868, 1877, and 1889 to provide agencies, aid and assistance, schools, and instruction, the burden is on defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians. *The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent proper charges against the Indians.* The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting. 105 Ct. Cl. at 802. [Emphasis supplied.]

The Indian Claims Commission attempted to distinguish the *Sioux* case on the grounds that it involved a "trust fund" whose handling was "governed by the rules applying to trustee and guardian," while the present case "only involves the relationship of * * * ordinary debtor and

creditor." 7 Ind. Cl. Comm. at 135-136. Since, as has been demonstrated above, an Indian tribe and the Government are not "ordinary debtor and creditor", and the Government's handling of its debts to the Indians is in fact "governed by the rules applying to trustee and guardian", the *Sioux* case is very much in point here.

The relationship between the United States and appellant is not *precisely* that of guardian and ward, but their relationship is sufficiently similar thereto to impose upon the United States the duty of maintaining a clear and unambiguous account of its payments to appellant under its various treaty commitments.

The conclusion that the United States owes to an Indian tribe the duty of maintaining a clear account is in accord not only with the authoritatively established nature of the relationship between the Government and the Indian tribes, but also with a practical understanding of the problems involved in this particular aspect of the dealings between these parties. Throughout the time during which the treaty payments here in issue were due, the Indians were largely illiterate and unskilled in the ways of the men who had arrived from Europe. Particularly unfamiliar must have been the ways of bookkeeping and accounting. To compare the facilities and capacity for maintaining financial records possessed by the United States Government with those possessed by the Indians, whose life was oriented so differently, is to reveal the reasonableness of the conclusion that the United States is charged with keeping a clear account of the payments it makes pursuant to its obligations to the Indians.

Treaties of 1802 and 1805

As was pointed out in the introductory section of this opinion, appellant is claiming an unpaid balance of $98,857.50 under the Treaties of 1802 and 1805. The Government claims credit for $99,461.45, an amount which the Government's records do not specifically show to have

been paid under these treaties. In the light of what I believe to be the nature of the relationship between the parties in this case, I think that the Government is entitled to credit for only that portion of the $99,461.45 which is sufficiently identified in its records as having been paid under the 1802 and 1805 Treaties.*

To show that some of the unallocated $99,461.45 could have been disbursed pursuant to treaties other than those of 1802 and 1805, appellant points to the Treaty of August 7, 1790, 7 Stat. 35, Article IV of which provided that the United States pay to the Creeks an annuity of $1,500. The United States also undertook to furnish domestic animals, farm implements, and interpreters to the Creeks. Appellant claims that the obligation to provide interpreters was worth $400 per year, and that the 1790 Treaty contained a secret article which obligated the United States to pay to Creek Chief Alexander Mc-

* The G.A.O. report lists disbursements totaling $22,198 in a section which says that it contains information relating to disbursements made during the years 1811 to 1834. Appellant therefore points to some ten treaties other than those of 1802 and 1805 between the Creek Nation and the United States which were in force during that period (Treaties of 1790, 1796, 1814, 1818, 1821, 1825, 1826, 1827, 1832 and 1833), and argues that the $22,198 may have been disbursed pursuant to some one of these treaties. We note, however, that although the section contains payments made from 1811 to 1834, the $22,198 in question is listed as having been paid in 1811, 1815, 1817 and 1818. It cannot, therefore, have been paid pursuant to any of the six treaties concluded after 1818. The effect of the 1790 and 1796 Treaties is discussed in the body of the opinion. The Treaty of August 9, 1814, 7 Stat. 120, does not appear to provide for any payments such as those listed for 1815, 1817 or 1818. That leaves the Treaty of January 22, 1818, 7 Stat. 171, which did provide for the payment in 1818 of $20,000, and which could therefore be the basis for the disbursement of the $12,285.58 listed for 1818. However, the G.A.O. report shows that $125,285.58 was disbursed specifically under the 1818 Treaty, which only provided for payment of $120,000 plus the furnishing of two blacksmiths and strikers for three years. It does not appear therefore, that the $22,198 could have been a disbursement pursuant to the 1818 Treaty.

Gillivray an annual stipend of $1,200, and to each of six other chiefs annual stipends of $100 for life. Appellant thus claims that the 1790 Treaty established a yearly obligation on the United States of $3,700. Appellee points out that there is no evidence of any secret article in the 1790 Treaty. Chief Alexander McGillivray died in 1793, so no part of his life annuity of $1,200 can have been included in the payments made starting in 1803. There is no showing as to the dates of death of the other six chiefs allegedly entitled to $100 life annuities.

It is clear, however, from the face of the treaty that there was an obligation of at least $1,500 per year. For the years 1790 through 1797, and 1800 through 1809, a total of eighteen years, the Government's records do not specifically show payment of this $1,500 annuity, so I think we should assume that at least $27,000 of the payments made from 1803 to 1818 were made in fulfillment of the 1790 Treaty obligation. Thus, of the $99,461.45 shown by the Government's accounts to have been paid to the Creeks, but not allocated to specific treaties, there is at most $72,461.45 which can be credited to the Government as fulfillment of its obligations under the Treaties of 1802 and 1805.

Appellant also points to the Treaty of June 29, 1796, 7 Stat. 56, and contends that some of the payments shown to have been made to the Creeks between 1803 and 1818 should be allocated to the 1796 Treaty. It may be noted, however, that all the payments listed in the G.A.O. report are labeled annuities, or goods for Chiefs. No expenditure under the 1796 Treaty could be so described, since that treaty provided for no annuity, or goods to chiefs. The 1796 Treaty obligations cannot, therefore, account for any of the payments shown to have been made to the Creeks from 1803 through 1818.

The amount of obligations under the 1802 and 1805 Treaties which are not specifically shown by the Govern-

ment's accounts to have been fulfilled is, as noted above, $98,857.50. The Government's accounts are specific enough, in the absence of any other treaty provisions under which the unallocated payments which its accounts show to have been made could have been due, to show payment of $72,461.45 of that amount, leaving $26,396.05 which is not shown to have been paid. In addition, I think that appellant should be permitted, upon a remand to the Indian Claims Commission, to show any other obligations of the United States, in addition to the $1,500 under the 1790 Treaty, for which the payments shown for 1803 through 1818 could have been intended, so that the amounts of such obligations could be subtracted from the $72,461.45 which I find to be the maximum allowable to the Government against its 1802 and 1805 treaty obligations, given the state of its records.

Treaty of 1832

Under Article XIII of the Treaty of March 24, 1832, 7 Stat. 366, the United States agreed to expend $3,000 per year for twenty years for the education of Creek children. The parties agree that the total obligation under the 1832 Treaty was $60,000.

Appellant admits that the Government's records are sufficient to show payment of $49,938.99, and it claims the additional $10,061.01.

The Indian Claims Commission did not, for some reason, make any finding as to the additional credits against this claim asserted by the Government, but stated only that

> There were disbursements for the period 1852 to 1861 in the amount of $60,673.23 * * * in fulfillment of the obligations of the treaties of 1832 and 1845 [9 Stat. 821] which defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

Appellant objects to the Commission's failure to make any finding as to whether or not the Government's obligation under the 1832 Treaty was fulfilled.

I think that the Commission's failure to find whether the 1832 Treaty obligation was fulfilled requires us to remand this portion of the case to the Commission for such a finding. On its face, the Commission's "finding" is merely a restatement of the Government's contention, and not a finding at all.

The Commission's "ultimate" finding that there was not sufficient evidence in the record to show that any of the indebtedness claimed by appellant had not been discharged does not remedy its failure to make a material finding of fact. Where required findings are not made by the Commission, the court will set aside the Commission's final determination and remand the case so that such findings may be made. *Snake or Piute Indians* v. *United States*, 125 Ct. Cl. 241, 255.

TREATY OF 1833

The Treaty of February 14, 1833, 7 Stat. 417, provided, in Article V:

> As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants

> to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians: * * *.

Appellant claims that the Government's total obligation under this Article was $105,690 ($2,700 per year for 39 years), and that only $76,285.45 has been paid thereunder, so that a balance of $29,404.55 remains due.

In this instance appellee does not claim credit for more than the $76,285.45 which its records show it to have paid under the 1833 Treaty. Appellee's contention is that the size of the obligation under the 1833 Treaty was not adequately established. Appellant's position is that Congress fixed the amount of the treaty obligations by the size of annual appropriations which it made under the treaty.

The Indian Claims Commission concluded that it was unnecessary for it to determine whether the basis for establishing the treaty liability as contended for by appellant was correct, in view of its holding that appellant had "not proven the alleged failures of the appellee to fulfill its obligations * * *". 7 Ind. Cl. Comm., 138. Since I would conclude that appellant has laid sufficient basis for a conclusion that appellee failed to fulfill its obligations, I think that it was necessary for the Indian Claims Commission to determine the amount of the Government's obligation under the 1833 Treaty. I would therefore remand this portion of the case to the Commission for such determination.

Treaty of 1856

Under Article VI of the Treaty of August 7, 1856, 11 Stat. 699, the United States undertook to invest $200,000 in safe stocks, and to apply the interest of at least 5% per annum to the education of the Creeks. Appellant claims that the stipulated interest for the years 1857 through 1861, inclusive, a total of $50,000, was appropriated by Congress, but that appellee's records show

distributions of only $21,000 pursuant to this obligation. Appellant claims the balance of $29,000. Appellee claims credit for two separate payments of the $29,000.

(1) First, appellee claims that the $29,000 was paid to the Creek Nation by the Confederate States of America, pursuant to a treaty, dated July 10, 1861, between the Confederate States and the Creek Nation. Appellee asserts that the Creek Nation's acceptance of the payment by the Confederate States of the United States' obligation discharged the United States' liability.

Appellant does not contest appellee's proposition of law, but denies that there was proper payment or, if there was, that it was validly accepted by the Creek Nation.

The Indian Claims Commission found:

> In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States.
>
> The Confederate States paid the $29,000 and plaintiff accepted the same.
>
> The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866.

Appellant argues that the Treaty of July 10, 1861, between the Creek Nation and the Confederate States, concluded at North Fork Village on the North Fork of the Canadian River, west of Arkansas, which provided for the payment of the $29,000 by the Confederate States, was only approved by some of the Creek chiefs without the action of the Creek Council, the governing body of the Creek Nation, and that the Creek Nation was about evenly divided in sympathies between the Union and the Confederacy.

I do not think that there is any evidence that the $29,000 was paid to the Creek Nation. The evidence shows that in Article XLI of the 1861 Treaty, the Confederate States agreed to pay the $29,000; that the Provisional Congress of the Confederate States appropriated the $29,000 on December 24, 1861; that on December 30, 1861, that amount was requisitioned by J. P. Benjamin, the Confederate Secretary of War, from the Confederate Secretary of the Treasury; that on the same date C. G. Memmenger, the Secretary of the Treasury, ordered a War Department Warrant No. 16 to be issued in favor of General Albert Pike, a War Department agent, for delivery to Major Elias Rector, Superintendent of Indian Affairs; that on January 1, 1862, S. S. Scott, Acting Commissioner of Indian Affairs, wrote to Major Rector at Fort Smith, Arkansas, informing him that the money was in the hands of General Pike for delivery to him; and that on January 28, 1862, General Pike wrote to Major Rector from Little Rock, Arkansas, informing him that he supposed he would reach Fort Smith in six days. It is true that there is no receipt for the $29,000, but in the light of the evidence which I have detailed, I think it was not improper for the Indian Claims Commission to conclude that the money was received by the Indians. See *Chickasaw Nation* v. *United States*, *supra*, 103 Ct. Cl. at 35.

However, although the evidence may be sufficient to support a finding that a payment of $29,000 was made to some Creek Indians, there is no indication that this payment was made to the Creek Nation, as distinguished from some portion thereof. The obligation here was owed to the Creek Nation, and could not be satisfied by payment to any party other than the Creek Nation. Debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Therefore, a payment to any party other than the Creek Nation, even if that party was some portion

of the Creek Nation, cannot have satisfied the obligation owed to the Creek Nation unless the party receiving payment was authorized to receive it on behalf of the Creek Nation. The evidence upon which appellee relies to show payment indicates that no payment was made to any party before January 28, 1862, on which date General Pike, the Confederate representative charged with delivering the money to the Creeks, was still at Little Rock, Arkansas. The evidence also indicates that after the treaty with the Confederacy had been signed on July 10, 1861, a considerable portion of the Creek Nation, under the leadership of Opoeth-le-yo-ho-la, was in sympathy with the Union. This group met in convention on August 5 and declared that the chiefs who had signed the Confederate treaty had forfeited their administrative rank. A "Non-Treaty Party" moved westward to avoid the reach of those who were sympathetic to the Confederate cause, and sent messengers to confer with representatives of the United States. The evidence also shows that by November 15, the Union-minded Creeks had withdrawn further north, toward the southern border of Kansas, and that they fought a series of battles with Confederate forces along the shores of the Arkansas and Verdegris Rivers throughout November and December of 1861. The size of the group with Opoeth-le-yo-ho-la is estimated at around 2,000 men, plus, women, children, and the sick and aged, in a total number of perhaps 6,000, estimated to be from one-half to three-fourths of the Creeks. It also appears that during the months of November and December representatives of the refugee Creeks groups were treating with United States agents for relief for the refugees and arranging for the rendering of military assistance by the Creeks to the United States.

It seems to me to be clearly established by the evidence that the Creek Nation had become divided into two independent entities. It cannot be said that the portion which remained in the South constituted, after

some time in November of 1861, the Creek Nation. Payment to this southern group cannot be said to have been payment of the obligation which was owed to the Creek Nation.

The record is barren of any evidence to show payment to an entity which could be called the Creek Nation. Indeed the evidence indicates, on the contrary, that payment was made to a body other than the Creek Nation, since it shows, as pointed out by appellee, that payment was made somewhere in the vicinity of Little Rock, Arkansas (that is, at the camp of the Southern group) some time after January 28, 1862 (that is, when the Creeks remaining in that vicinity no longer constituted the Creek Nation).

(2) The basis for appellee's second claim of credit for a second payment of the $29,000 is that the United States authorized payments, out of Creek annuities which had not yet been paid, for the benefit of refugee Indians during the Civil War, Resolution of February 22, 1862, 12 Stat. 614; that the $29,000 here in question was so used; and that the use of the annuities for that purpose was ratified and confirmed by appellant by Article XI of the Treaty of June 14, 1866, 14 Stat. 785, 789-790.

The Supreme Court's decision in *Seminole Nation* v. *United States*, 316 U.S. 286, 290-291, supports appellee's legal position, if in fact the $29,000 here in question has been shown to have been disbursed for the benefit of refugee Indians. In the *Seminole* case this court had found that the $61,563.42 in question had been diverted *and disbursed* by the Government.

While it is clear that payments were made by the United States for the benefit of refugee Indians, I do not think that there is substantial evidence in this case to support a finding that *the $29,000* in issue was in fact paid to refugee Indians. I note that the Indian Claims Commission did not so find. It found only that the United

States Congress had approved such payment for the benefit of refugee Indians,[2] "which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790)."

The Treaty of 1866 approved and confirmed *expenditures made* by the United States since the diversion of annuities for that purpose. The fact that other annuity money was diverted for payment to the refugees does not establish that the United States' obligation for this $29,000 was released.

The evidence in this case shows that $343,321.17 was disbursed by the United States, during the years 1862 to 1867 for the relief of refugee Indians, under the appropriation entitled "Fulfilling Treaties with Creeks." Appellee says that Creek treaties in force during that period provided for a total of $229,260 in annuities payable to the Creeks. This figure appears to have been taken from the total amounts appropriated under Creek treaties by Congress in the fiscal years 1862-1866.

Appellee argues that because the amount expended for the relief of refugee Indians exceeded the total of the United States' obligations for the period in question by more than $29,000, the $29,000 due under Article VI of the Treaty of 1856 is shown to have been expended for the refugee Indians. This does not follow at all. There may well have been other outstanding Creek treaty obligations which formed the basis for the 1862-1867 expenditures. Indeed there must have been, since the excess of expenditures over current treaty obligations was considerably more than $29,000.

Unless, upon remand to the Indian Claims Commission, appellee could show that the $29,000 due under the 1856

[2] This approval was not specifically of the $29,000, but of all "annuities payable to the * * * Creeks * * * and which have not been paid." Resolution of February 22, 1862, 12 Stat. 614.

Treaty was among the sums disbursed in 1862-1867, either by pointing to an explicit accounting for that obligation, or by showing that the total of the treaty obligations payable to the Creeks was not greater than the amount of 1862-1867 expenditures in excess of current obligations, or otherwise, I think that appellant is entitled to recover the $29,000.

For the foregoing reasons, I respectfully dissent.

[117]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Decided: February 18, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The Plaintiff, the Creek Nation of Indians, is a tribe of American Indians within the meaning of the Indian Claims Commission Act, and as such is authorized to bring this cause of action under Sec. 2 of said Act. This claim is not included in any suit pending in the Court of Claims or the Supreme Court of the United States, nor was it pending in the Court of Claims under any legislation in effect on the date of approval of said Indian Claims Commission Act (Pltf's Req. Find. No. 1 and Dft. Req. Find. No. 1)

2. Plaintiff asserts a claim in law under Clause (1), Sec. 2, Indian Claims Commission Act. The claim is in the nature of an action of debt asking payment for sums allegedly owing and unpaid and obligations unfulfilled, due plaintiff under Treaties of 1802, 1805, 1832, 1833, and 1856.

3. The relation of guardian and ward as between the plaintiff and the defendant has not been established by competent or relevant evidence.

[118] 4. Article II of the Treaty of June 16, 1802 between the Creek Nation and the United States, proclaimed January 11, 1803 (7 Stat. 68) provided in part as follows:

> The commissioners of the United States, for and in consideration of the foregoing concession on the part of the Creek Nation, and in full satisfaction for the same do hereby covenant and agree with the said nation, in behalf of the United States, that the said states shall pay to the said nation, annually, and every year, the sum of three thousand dollars, and one thousand dollars of the term of ten years, to the chiefs who administer the government, agreeably to a certificate under the hands and seals of the commissioners of the United States, of this date, and also twenty five thousand dollars in the manner and form following, viz. Ten thousand dollars in goods and merchandise, the receipt of which is hereby acknowledged: ten thousand dollars to satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States: the said debts, after the payment aforesaid, to become the right and property of the Creek Nation, and to be recovered for their use in such way and manner as the President of the United States may think proper to direct: five thousand dollars to satisfy claims for property taken by individuals of the said nation, from the citizens of the United States, subsequent to the treaty of Colerain, which has been or may be claimed and established agreeably to the provisions of the act for regulating trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. * * * *

Article IV of said treaty provided:

> The contracting parties to these presents, do agree that this treaty shall become obligatory and of full effect so soon as the same shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof.

This treaty became effective on January 11, 1803, the date of its proclamation by the President. Thereunder the United States was obligated by the above treaty stipu-

lation to pay said perpetual annuity of $3,000.00 per annum beginning with the year 1803 through the fiscal year 1902 (Cl. Ex. 1, pp. 131, 708), when this permanent annuity was funded under the Act of May 27, 1902 (32 [119] Stat. 249)—a period of 100 years, less the Civil War period of six years (fiscal years 1862 through 1867),* leaving a net obligation of the United States to pay said permanent annuity to the Creek Nation over a period of 94 years at $3,000.00 per annum, or a total obligation of $282,000.00, under the above Article II.

The total obligations of the United States under said Article II for which this claim is based are set forth as follows:

Permanent annuity of $3,000.00 per annum for 94 years	$282,000.00
Annuity to chiefs, $1,000.00 per annum for 10 years	10,000.00
In goods and merchandise, receipt of which was acknowledged	10,000.00
To satisfy certain debts due from Indians and white persons of the Creek country to the factory of the United States	10,000.00
To satisfy claims for property taken by individuals of the Creek Nation, from citizens of the United States subsequent to the Treaty of Colerain	5,000.00
	$317,000.00

The defendant agrees that the obligation of the United States under the provisions of the aforesaid treaty is the amount of $317,000.00 as hereinabove stated.

Plaintiff admits the payment and disbursement by the United States to the Creek Nation on said treaty obligation and in the amount of $254,690.25 (as itemized in its

* The Creek Nation has eliminated any claim in this case for annuity payments due from the United States during the Civil War period, or for the fiscal years 1862-1867, 6 years, this period being covered by separate petition in Docket No. 274 (R. 3).

Req. Find. No. 4) and claims a balance due under said treaty obligation in the amount of $62,309.75.

[120] The General Accounting Office report shows that unallocated payments and goods of the value stated were paid and forwarded to the Creek Indians within the years stated as follows:

Year	Value of Goods	Remarks
1803	$ 3,00 .00	Annuities for Creeks
1803	1,008.08	Goods for Creek Chiefs
1804	4,150.84	Annuities for Creeks
1804	1,100.07	Goods for Creek Chiefs
1805	4,000.24	Annuities for Creeks
1805	500.16	Goods for Creek Chiefs
1805	4,000.00	Annuity for year 1805
1806	6,000.50	Annuity for year 1806
1806	6,343.85	Annuity for year 1806
1807	1,000.08	Goods for Upper Creek Chiefs
1807	499.05	Goods for Lower Creek Chiefs
1807	6,025.06	Annuity for Upper Creeks
1807	5,999.39	Annuity for Lower Creeks
1808	7,646.46	Annuity for Upper Creeks
1808	8,250.45	Annuity for Lower Creeks
1808	501.38	Goods for Lower Creek Chiefs
1808	499.90	Goods for Upper Creek Chiefs
1809	500.41	Goods for Upper Creek Chiefs
1809	348.98	Goods for Lower Creek Chiefs
1809	7,300.40	Annuity for Upper Creeks
1809	7,749.64	Annuity for Lower Creeks
1809	508.51	Annuity for year 1809

These unallocated goods forwarded amount to $77,263.45 and consist of $71,305.34 in annuities and $5,958.11 to Chiefs for the period 1803-1809, inclusive (Dft. Ex. 142, p. 103)

These disbursements are disbursements which the General Accounting Office cannot definitely and clearly identify as having been disbursements in fulfillment of the obligations of the Treaty of 1802 or 1805.

In addition to the foregoing goods forwarded, which the report does not allocate to any treaty stipulation due

(Says General Accounting Office) to incompleteness of records, said report shows additional disbursements for the benefit of the Creek Indians for purposes stipulated [121] in various treaties with the Creeks, which the Accounting Office says cannot be identified as having been disbursed in fulfillment of any particular treaty and are, therefore, not allocated to any specific treaty as follows:

	1811	1815	1817	1818
Annuity, goods	$3,350.00	$4,300.00		
Annuity, cash				$6,517.00
Claims (depredations)			$2,000.00	5,801.00
Cash payments to Chiefs	200.00			

These disbursements amount to $22,198.00 and consist of $14,197.00 annuity disbursements, $7,801.00 claims and $200.00 payment to Chiefs. (Dft. Ex. 142, pp. 685-689)

5. Article III of the Treaty of November 14, 1805, between the Creek Nation and the United States, proclaimed June 2, 1806 (7 Stat. 96, 2 Kapp. 85), provided as follows:

> "it is hereby stipulated and agreed, on the part of the United States, as a full consideration for the land ceded by the Creek nation in the first article as well as by permission granted for a horse path through their country, and the occupancy of the reserved tract, at the old Ocmulgee fields, that there shall be paid annually to the Creek nation, by the United States for the term of eight years, twelve thousand dollars in money or goods, and implements of husbandry, at the option of the Creek nation, seasonally signified from time to time, through the agent of the United States, residing with said nation, to the department of war; and eleven thousand dollars shall be paid in like manner, annually, for the term of the ten succeeding years, making in the whole, eighteen payments in the course of eighteen years, without interest. The first payment is to be made as soon as practicable after the ratification of this convention by the government of the United States, and each payment shall be made at the reserved tract, on the old Ocmulgee fields."

Article V. of said treaty provided in part:

> "* * * and this convention shall be obligatory on the contracting parties as soon as the same shall have been ratified by the government of the United States."

Said treaty became effective on June 2, 1806, when proclaimed (2 Kapp. 85).

[122] The total obligation of the United States to the Creek Nation under said Article III was as follows:

$12,000.00 annually for 8 years in money, or goods, and implements of husbandry, at the option of the Creek Nation	$ 96,000.00
$11,000.00 annually for 10 succeeding years, to be paid in like manner	$110,000.00
Total obligation	$206,000.00

The report of the Accounting Office shows annual appropriations to fulfill the above obligation, but disbursements definitely allocated to the fulfillment of the obligations of this treaty are in the amount of $169,452.25.

The defendant admits the obligation under said treaty to be in the amount of $206,000.00 as above stated. The unallocated disbursements by defendant, as stated in the preceding finding, in the total amount of $99,461.45 is in excess of the amounts claimed by the plaintiffs as being due and unpaid under the obligations of both the Treaties of 1802 and 1805.

6. Under Article XIII of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366), it was provided that $3,000 should be expended, as the President might direct, for the term of twenty years for teaching plaintiffs' children. The total obligation of the United States to the Creek Nation under said Article XIII amounted to $60,000.00. This is agreed to by defendant.

Article 4 of a Treaty of January 4, 1845 between the Creek Nation and the United States (9 Stat. 821) provided for an additional annual annuity by the United States for the purpose of education of the children of plaintiff in the amount of $3,000.00 per year should be allowed for a term of twenty years and that the annuity of $3,000 per year provided in the Treaty of 1832 should [123] be continued until the termination of the educational annuity provided in said 1845 treaty.

Article 5 of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) amended and continued Article 4 of the Treaty of 1845 (and the Treaty of 1832) by providing for an annuity of $6,000 per annum for education for seven years.

The plaintiff approves fulfillment by the defendant of the obligations of the Treaty of 1832 in the amount of $49,938.99 as itemized in its Requested Finding 6 and contends that there is a balance due from said obligation in the amount of $10,061.01. This credit in the amount of $49,938.99 is for disbursements up to and including the year 1851 only; however, there were disbursements for the period 1852 to 1861 in the amount of $60,673.23 (Dft's Ex. 185, 186) in fulfillment of the obligations of the treaties of 1832 and 1845 that defendant contends is in full settlement of its obligation made by the Treaty of 1832 and renewed and enlarged by the Treaty of 1845.

7. Article V of the Treaty of February 14, 1833 between the United States and the Creek Nation (7 Stat. 417) provided in part as follows:

> "As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagon-

maker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as the President may consider them conducive to [124] the interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. * * *"

Article IX of said treaty provided:

"This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States."

This treaty became binding upon the parties on April 12, 1834, when proclaimed (2 Kapp. 388).

Petitioner contends that the obligation of the United States under said treaty was for a period of 39 years (omitting the Civil War years) at $2,710.00 per annum or a total obligation of $105,690.00; and that the report of the General Accounting Office showed expenditures in fulfillment of said treaty obligation by the United States in the amount of $80,981.45 (items appearing in its Req. Find. No. 7) and that there is a balance due under said treaty obligation of $24,708.55 (Pltf. in its reply brief claims a credit of $4,696.00 was erroneously given defendant and that the balance due is $29,404.55, Reply Brief pp. 32, 33)

There is no proof in the record as to any pecuniary loss suffered by the petitioner, nor as to the need of services of blacksmiths or other equipment which the treaty obligated the defendant to provide, nor is there

any evidence of any demand having been made by petitioner for services or equipment not supplied.

8. Article VI of the Treaty of August 7, 1856 between the United States and the Creek Nation (11 Stat. 699) provided in part as follows:

> "In consideration of the foregoing quit-claim, relin-
> [125] quishment, release, and discharge, and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, viz: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least five per cent, per annum; which interest shall be regularly and faithfully applied to purposes of education among the Creeks; * * *"

Plaintiff claims an obligation of defendant under the above provision to pay $10,000 as interest to the plaintiff for the years 1857 to 1861, both inclusive—a total of $50,000 upon which obligation the plaintiff contends the defendant still owes $29,000. (Pet. Req. Finding No. 8).

In a treaty dated July 10, 1861, between the plaintiff and the Confederate States of America, it was agreed that the Confederate States of America would pay said sum of $29,000 due and owing by the United States. (Dft's Ex. 159, page 297)

The Confederate States paid the $29,000 and plaintiff accepted the same. (Dft's Ex. 160, p. 232; Dft's Ex. 166-170, 173).

The United States Congress also approved the payment of the $29,000 involved in this claim for the benefit of Indians remaining loyal to the United States during the Civil War, which expenditure the plaintiff Indians approved and ratified in the Treaty of June 14, 1866 (14 Stat. 785, 790).

9. The treaty of defendant with the Creek and Seminole Tribes of Indians of August 7, 1856 (11 Stat. 699) provided in Article V thereof that all claims and demands whatsoever which the Creek Nation might have against the United States, excepting only those continued as set out in said article, should be released and fully discharged. [126] Many of the claims asserted by the plaintiff herein are not among those specifically mentioned in said treaty provisions as being continued as liabilities of the defendant.

10. There is not sufficient evidence in the record to show that any of the indebtedness claimed by the plaintiff has not been discharged.

/s/ Edgar E. Witt
Chief Commissioner

/s/ Louis J. O'Marr
Associate Commissioner

/s/ W. M. Holt
Associate Commissioner

[127]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 292

THE CREEK NATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: Feb. 18, 1959

Appearances:

Mr. Paul M. Niebell
Attorney for Plaintiff

Mr. Keith Browne, with whom
was Mr. Assistant Attorney
General, Perry W. Morton,
Attorneys for Defendant

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The plaintiff in its original petition asserts that it was the owner of trust and other funds, which said trust and other funds were held in trust by the defendant and paid and administered for the use and benefit of plaintiff, and that it was provided by the treaties between plaintiff and defendant that said trust and other funds were to be managed and invested and otherwise disposed of by defendant for the benefit of plaintiff, said treaties being specifically referred to in later allegations of said petition.

However, in the several claims thereafter in the petition specifically set out, no one of said claims in the opinion of this Commission, is shown to involve trust funds.

[128] The first claim is for $87,309.75 and is described in detail in Sec. IV of plaintiff's petition and in Requested Finding No. 4 of plaintiff's requested findings of fact. Both descriptions of said claim state that same arose under Article II of the Treaty of June 16, 1802 (7 Stat. 68). In the petition it is alleged that defendant's total *obligation* under said treaty amounted to $320,000.00 and that defendant disbursed $232,690.25 only on said treaty obligation and therefore the amount of $87,309.75 is *due and owing* to plaintiff from defendant for defendant's *failure to fulfill said treaty obligation*. In the Requested Finding No. 4 plaintiff requests a finding that the total *obligations* of the United States under said Article II of said treaty amount to $317,000.00 on which the United States had only disbursed and accounted to the plaintiff for $254,690.25 and that defendant is *now due and owing to the Creek Nation a balance* of $62,309.75, for which the defendant has failed to account.

Both descriptions of said claim are for indebtedness claimed to have been created on the part of the defendant to the plaintiff by the provisions of the Treaty of June 16, 1802, and not for moneys it had received from or for the plaintiff, the management of which the defendant became trustee.

The next claim for which suit is brought is set out in Sec. V of plaintiff's petition. This claim is based on the provisions of Article III of the Treaty of November 14, 1805 between the Creek Nation and the United States (7 Stat. 96). The plaintiff alleges that said Article III created a total *obligation* on the part of the United States [129] to defendant in the amount of $196,000.00 on which the defendant disbursed $169,452.25 only on said treaty *obligation*, and therefore the amount of $26,547.75 *is due*

and owing to plaintiff for defendant's failure to fulfill said treaty obligation.

This claim is again described in plaintiff's Requested Finding No. 5 in which it is stated that the total obligation under said treaty was $206,000.00 and total disbursements shown by General Accounting Office to be only $169,452.75, although Congress has appropriated the full amount due. And the balance now due and owing by the defendant on said treaty obligation is in the amount of $36,547.75.

The next claim is described in Sec. VI of plaintiff's petition as arising under provisions of the Treaty of March 24, 1832 between the United States and the Creek Nation (7 Stat. 366) which total obligation under said treaty is alleged to be $60,000.00 on which it is alleged the defendant disbursed $49,938.99 only on said treaty obligation and therefore the amount of $10,061.01 *is now due and owing.* This claim is again described in plaintiff's Finding No. 6 wherein the *total obligation* under said treaty is stated to be $60,000.00, the total disbursement of the defendant on said obligation as having been only $49,938.99, leaving a balance *now due and owing from the United States to the Creek Nation* in the amount of $10,061.01.

The next claim for which suit is brought is described in Sec. VII of plaintiff's petition as arising out of treaty between the United States and the Creek Nation on February 14, 1833 (7 Stat. 417). It is alleged that the total *obligation* of the United States to the plaintiff under the provisions of said treaty was $119,240.00, on which [130] the defendant disbursed only $74,290.45, and the defendant *is now due and owing* to the plaintiff $44,-949.55.

In petitioner's Finding No. 7 the total of said *obligation* under the above treaty is stated to have been $105,690.00, on which the defendant paid and disbursed to the Creek Nation in fulfillment thereof only the amount of $80,-

981.45 and that there is a balance now *due and owing* by the defendant to the plaintiff under said treaty obligation the amount of $24,708.45.

In plaintiff's reply brief (pp. 32, 33,) it is alleged that an error had been made in giving the defendant credit for $4,696.00 to which it was not entitled and that the total disbursement to which the defendant was entitled to credit was only $76,285.45 and that plaintiff's claim on said item is the amount of $29,404.55.

In Sec. VIII of the plaintiff's petition a provision of the Treaty of August 7, 1856 (11 Stat. 699) is alleged as creating an *obligation* on the part of defendant to *pay* annually an item of $10,000.00 as interest to plaintiff; that said interest became due and owing for the years 1857-61 inclusive in the total amount of $50,000.00 on which obligation the defendant disbursed only $21,000, although Congress appropirated the total of $50,000.00, and therefore the amount of $29,000.00 *is due and owing to plaintiff from defendant* because of defendant's *failure to fulfill said treaty obligation.*

This liability is also described in plaintiff's Requested Finding No. 8 in practically the same language as described in the original petition.

[131] The final prayer of the plaintiff in its original petition reads as follows:

> "WHEREFORE, plaintiff prays:
>
> 1. That plaintiff be awarded judgment against defendant for the total amounts of said unfulfilled treaty obligations, together with interest at five per centum per annum on said amounts to date."

In plaintiff's last Requested Finding No. 9 in recapitulation the plaintiff asks for this finding:

> "Therefore, there is due and owing to the Creek Nation from the United States the following unpaid

balance under the above treaty obligations of the United States."

Then follows an itemized statement of the several amounts previously asked for as due and owing aggregating with the added amounts stated in the reply brief in the total amount of $167,323.06.

In plaintiff's Request for Findings of Fact No. 2 the treaty between the Creek Nation and the United States of August 7, 1790 (7 Stat. 35) is quoted the provisions whereby the Creek Nation acknowledges itself to be under the protection of the United States and no other sovereign, etc. and it is requested that this treaty provision be found to have created thereafter a fiduciary relationship between the Creek Nation and the United States as that of guardian and Indian ward. Thereafter in plaintiff's brief (p. 11) in support of the above requested finding, the plaintiff alleges that the claim (meaning all of the claims in the present suit) is for an accounting brought against the United States, "*its guardian.*"

Statement is then made (Brief, p. 2) that the claims presented are "claims under treaty provisions as the General Accounting Report clearly shows were not fulfilled [132] by the United States, and as to which balances are shown therein *to be due and owing from the United States to the Creek Nation.*" Both parties make many and varying contentions as to the items of charge and credit involved, but we think the disposition of the case, without going into many of the contentions and controversies as to items, is determined by *where the burden of proof lies*—that is whether the burden is on the part of the plaintiff to prove a failure to discharge the obligations undertaken by the defendant, or whether the burden is on the defendant to prove that it discharged these obligations and is liable to the plaintiff upon its failure to do so. This question is determinable by whether the defendant stands in relation to the plaintiff as a guardian

or as trustee of funds belonging to the plaintiff, or whether the relationship is that of debtor and creditor.

As supporting its contention that the relationship is that of guardian and ward, the plaintiff relies on the language of the Treaty of 1790 which is quoted in findings of fact and also in the decisions of the Supreme Court in the Seminole case (316 U.S. 286, 295-297) and that of the *Sioux Tribe* v. *United States* (105 C. Cls. 725-802). The language of the Supreme Court case, upon which the plaintiff relies, is language in keeping with that of many other decisions of the Supreme Court and other courts to the effect that there is a duty upon the Government in its dealings with the Indian Tribes of a more exacting nature than with two entities that might be called on a par with each other; but there is nothing in the decision that indicates a change in the burden of proof in such matters [133] as are involved in the present law suit. The decision of the Supreme Court cited was rendered on *May 11, 1942*. Some of the funds involved in that case grew out of treaties and obligations of debt created thereby. Others were trust funds.

The language quoted by the plaintiff from that decision was with regard to a claim based on alleged liability for a trust fund, provided by Article VIII of a Treaty of 1856 (11 Stat. 699), which fund was to be invested and managed for the plaintiff by the Government. At a later date (Nov. 5, 1945) the Supreme Court held by refusing Writ of Certiorari that a mere indebtedness of the Government to an Indian Tribe was not a trust fund.

We refer to the case of the Chickasaw Indians against the United States (in which, by the way, Mr. Paul M. Niebell, who is counsel in this case, was counsel therein) reported in 103 C.Cls. 1-57, as to which the Supreme Court on November 5, 1945 denied certiorari as to the judgment on the merits. This case involves, among other claims, plain and simple treaty obligations of the United

States to the plaintiff Indians, as to which the plaintiff claimed nonpayment and non-fulfillment. As in the case at bar the evidence upon which the plaintiff relied for the nonfulfillment of the obligations, and its right to recover therefor, *was a failure of the defendant to prove compliance and fulfillment.* In many instances there was a showing of merchandise due and owing by the defendant to the plaintiff, and by the defendant, merely a memorandum of purchase for the plaintiff, *but no showing of actual* [134] *delivery to the plaintiff. There being no proof on the part of the plaintiff that it did not get the goods and value.* The plaintiff therein contended, as in the case at bar, that the burden was on defendant to prove delivery to plaintiff, or payment to plaintiff. A statement of the Court as to same is applicable to many of the situations in the case at bar; "for the years 1798, 1799, and 1800 goods of the annuity values were forwarded from the War Department Storehouse in Philadelphia for the Chickasaw Nation. It must be presumed *that they were received in due course.* (underscoring supplied) To require defendant to prove affirmatively that the goods were received (the proof at this late date would have to be documentary) would place an impossible burden where it does not rightfully belong. *The burden is upon the plaintiff to prove its case.* While the jurisdictional act waives the lapse of time, it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff."

Other claims in the Chickasaw case were for deposits of Chickasaw money to other tribes. The Court says: "there is lack of proof that the deposits were erroneously made. The mere fact of deposit to other than a Chickasaw fund, without more, does not entitle plaintiff to recover • • •" "No judgment of recovery can be based on the showing made." (p. 42)

There were some items of claim allowed in the Chickasaw case, items in which the burden of proof was not involved. Offsets were allowed, however, which wiped [135] out the entire amount of the award. Petition for Certiorari was filed with the Supreme Court on the whole case. It was allowed only as to the offsets. We find, upon examining the petition for certiorari that it was stated that the basic question presented was "whether the regular equitable principles governing an accounting between the guardian and ward are to be applied to a case in which the Chickasaw Nation demands an accounting from the United States of moneys due it under treaties and agreements." Also, "whether the Indian ward has the burden of proving the items it excepts to in the guardian's account." The refusal of the Supreme Court to allow certiorari on the matters hereinabove specifically called to its attention is evidence that it approved the holdings of the Court of Claims in reference to such matters; and this, of course, leaves the law as applied to the "burden of proof" where it was found by the Court of Claims to be—that was on the plaintiff. This is therefore the law as to the burden of proof applicable to the claims in the instant case.

As the plaintiff, in support of its viewpoint as to the burden of proof also cites the case of *Sioux* v. *United States* (105 C. Cls. 725) wherein the court states that "The defendant is the trustee; it kept and has all the records and evidence and it has the burden of making the proper accounting," (p. 802), attention will be called to the fact that in that case the matter involved was the proceeds in the possession of defendant of land sold by the defendant, which money, of course, was a trust fund and the handling of same is governed by the rules applying to trustee and guardian. Such is not the situation [136] in the present case, but only involves the relationship of relationship of ordinary debtor and creditor.

The plaintiff relies solely on the language of the Treaty of 1790 (under which no claim asserted is based) as the basis for its claim that the relationship of guardian and ward existed between it and the defendant. One of the latest pronouncements with reference to the relationship between the Indian tribes and the United States is that of *Gila River Pima—Maricopa Indian Community* v. *United States* (Ct. Cls., 140 F. Supp. 766, 780)

> Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive Order, or statute under which the claim presented arises. It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that the doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (Citing *Creek Nation* v. *United States*, 318 U.S. 629, 642)

We also call attention to a discussion of the Court of Claims as to the relationship of guardian and ward as between Indian Tribes and the Government appearing in the decision of that Court in the case of *Sioux Tribe* vs. *United States*, 146 F. Supp. 299 (1956); also discussion of this question by this Commission in its opinion in the *Omaha Tribe, et al* vs. *United States*, 6 Ind. Cls. Com. 68, 73, 74.

[137] The plaintiff makes mention in its reply of the Chickasaw case (103 C.Cls. 1) and insists that the decision therein has no application to the present case, and in any event the holding of the Court of Claims in the *Sioux*

case, 105 C. Cls. 725, overrules the holdings in the *Chickasaw* case. The decision in the Sioux case, if it were different from that in the Chickasaw case, could not overrule the same because the Sioux case is a Court of Claims opinion only, while the holdings in the Chickasaw case were approved by the Supreme Court by its refusal to grant a writ of certiorari. However, the holding in the Sioux case is not on facts of the kind involved in the Chickasaw case, because claim in the Sioux case was based on the handling of funds received by the United States as the proceeds of the sale by it of lands belonging to the Sioux Tribe whereby said funds became trust funds and the principle of law applying to the handling of same by trustee or guardian applied.

The plaintiff makes the statement in its reply brief (p. 51) that if it "had filed suit under the Creek Treaties of 1790 and 1796, and under the Secret Article of the 1790 treaty, we would have had a somewhat similar case to that of the Chickasaws." We cannot follow such reasoning. The instant case seems to be on "all fours" with the claims we rely on in the Chickasaw case.

The *Menominee* case, reported at 102 C. Cls. 355, involved proceeds of sale of plaintiff's property, and that reported 118 C. Cls. 326 involved offsets asserted by it, and are not applicable to the case at bar.

[138] As to the monetary liability, if any, created by the obligation of the Government to furnish black-smith, wheelwright and equipment, as to which specific money obligations are not specified, the defendant contends that such obligations do not create a fixed monetary liability; and that to recover for a failure on the part of the defendant to comply with the treaty stipulations would require proof on the part of the plaintiff as to the pecuniary losses suffered by reason of the alleged failure. As to whether or not this contention is correct, or as to whether the basis for the sums claimed by the plaintiff as money

liability for the alleged failure on the part of the defendant is correct, it is not necessary for us to determine under our holding that plaintiff has not proven the alleged failures of the defendant to fulfill its obligations as it is its duty to do before any recovery can be had.

Defendant contends that the claims are res judicata by reason of jurisdictional acts and cases cited. The defendant also claims that by provisions of the Treaty of August 7, 1856 plaintiff released many of the claims urged in this case. This Commission is inclined to the opinion that the defense of res judicata is not well taken but with reference to the effect of the release provisions of the Treaty of 1856, it is inclined to agree with defendant: however, in view of its decisions on the merits, it is not necessary for it to decide as to the plea of res judicata or as to the effect of release provisions of the Treaty of 1856. As to said release, however, the plaintiff practically admits its effectiveness as to all claims based on [139] the treaties of 1805 and 1832 when it says in its reply brief (p. 56), "As a legal matter this release would bar the claims under the Treaties of 1805 and 1832 as defendant contends." Certainly the claims of this suit are based on treaties, not on moral obligations and are definitely and unquestionably legal claims and are being so urged and urged only as legal claims.

In keeping with this opinion and findings of fact filed herein, this case will be dismissed.

s/ Edgar E. Witt
Chief Commissioner

Concurring:

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner